U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 01 August 2007

Case No: 2004-BLA-06091

In the Matter of:

M.C.,
Claimant

v.

C & S CONSTRUCTION,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

Appearances: Edmond Collett, Esq.
For the Claimant

Lois A. Kitts, Esq.
For the Employer

Brian Dougherty, Esq.
For the Director

Before: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969 as amended, 30 U.S.C. § 901 et seq. ("Act"). The Act and implementing Regulations, 20 C.F.R. Parts 410, 718, and 725, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and Regulations define pneumoconiosis, commonly known as black lung disease, as a "chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising

out of coal mine employment." 30 U.S.C. § 902(b) (2000); 20 C.F.R. § 718.201(a) (2004). The definition of pneumoconiosis encompasses both clinical pneumoconiosis[1] and legal pneumoconiosis.[2] 20 C.F.R. § 718.201(a). In this case, the Claimant[3] alleges he is totally disabled by pneumoconiosis arising out of his coal mine employment.

PROCEDURAL HISTORY

The Claimant filed his claim for benefits under the Act on April 18, 2002. (DX 2.) The Office of Workers' Compensation Programs ("OWCP") identified McCoy Coal Company ("McCoy") and C & S Construction, the Employer in this case, as the potentially responsible operators. (DX 13, 17.) The OWCP issued a notice of claim to McCoy on June 20, 2002, and on July 16, 2002, McCoy and its insurance carrier, Kentucky Coal Producer's Self-Insurance Fund, filed a response controverting liability. (DX 14, 15.) The OWCP issued a notice of claim to the Employer on March 11, 2003, but did not list an insurance company. (DX 18.) The Employer did not respond.

On July 16, 2003, the OWCP issued a "Schedule for the Submission of Additional Evidence" to the Claimant, McCoy, and the Employer, naming the Employer the designated responsible operator. (DX 20.) The schedule instructed the Employer to respond by August 15, 2003, or it would be deemed to have accepted designation as responsible operator and to have waived its right to contest liability. (DX 20.) The schedule further gave the parties until September 14, 2003, to submit evidence and identify potential witnesses that might testify at hearing regarding liability. (DX 20.) On July 31, 2003, McCoy and its carrier filed a response to the schedule, again disagreeing with its designation as responsible operator and contesting the Claimant's entitlement to benefits. (DX 21.) The Employer again did not respond.

The OWCP issued a second Notice of Claim to the Employer on August 20, 2003, this time including an insurance carrier, American Mining Insurance Company ("American"). (DX 23.) By letter of September 19, 2003, American filed a controversion of liability on behalf of the Employer. (DX 24.) On October 6, 2003, American filed a motion to dismiss it as the responsible carrier, as it did not insure the Employer during the time the Claimant worked for the Employer. (DX 25.) American filed a Renewed Motion to Dismiss on October 30, 2003, after the Claimant's deposition. (DX 27.)

The District Director of the OWCP issued a Proposed Decision and Order denying benefits on December 10, 2003. (DX 30.) In that Proposed Decision and Order, the District Director dismissed McCoy as responsible operator and the Employer was designated the responsible operator. (DX 30.) On that same date, the District Director dismissed American as the

[1] Clinical pneumoconiosis is any disease "recognized by the medical community as pneumoconioses," including coal workers' pneumoconiosis. 20 C.F.R. § 718.201(a)(1).

[2] Legal pneumoconiosis is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2). This definition includes chronic obstructive pulmonary disease, as long as it arose out of the miner's coal mine employment. *Id.*

[3] After August 1, 2006, the Department of Labor policy requires the use of initials for claimants' name in headings and use of a descriptive title in the decision. Accordingly, "Claimant" is used in this decision instead of the proper name of the coal miner.

potentially liable insurance carrier for the claim. (DX 31.) The Claimant requested a formal hearing before the Office of Administrative Law Judges on December 19, 2003. (EX 32.)

On February 8, 2006, the Employer moved for dismissal as responsible operator and on June 8, 2006, Administrative Law Judge Odegard issued an Order finding that the Claimant was a miner and the Employer was an operator pursuant to the Act and Regulations. (ALJX 4.) As such, Administrative Law Judge Odegard denied the Employer's motion. (ALJX 4.)

A formal hearing was held before this Administrative Law Judge in Hazard, Kentucky on January 16, 2007, at which time the parties were afforded full opportunity to present evidence and argument as provided in the Act and applicable regulations. At the hearing, Administrative Law Judge Exhibits 1 through 8, Claimant's Exhibit 1, Employer's Exhibit 1 through 10, and Director's Exhibits 1 through 38 were admitted into without objection. (TR at 6-9.)[4] The post-hearing written briefs filed by the respective counsel for the Claimant and the Employer were also considered.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, in light of argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The Parties have submitted no stipulations.

APPLICABLE STANDARDS

This claim was filed after January 19, 2001, the effective date for the current Regulations. For this reason, the Regulations at 20 C.F.R. Parts 718 and 725 apply. 20 C.F.R. §§ 718.2, 725.2 (2004). To be entitled to benefits under Part 718, the Claimant must establish that: (1) he suffers from pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; and (4) pneumoconiosis caused his total disability. 20 CFR §§ 718.1, 718.202, 718.203, 718.204, and 725.103 (2004).

ISSUES

The following issues are contested by the parties:

1. Whether the claim was timely filed.

2. Whether the Claimant is a miner under the Act.

3. How long the Claimant worked as a miner.

[4] The following abbreviations will be used throughout this Decision as citations to the record: ALJX – Administrative Law Judge Exhibits; CX – Claimant Exhibits; EX – Employer Exhibits; DX – Director Exhibits; and TR – Transcript of Hearing.

4. Whether the named Employer is the Responsible Operator.

5. Whether the Claimant has pneumoconiosis as defined by the Act and Regulations.

6. Whether the Claimant's pneumoconiosis arose from coal mine employment.

7. Whether the Claimant is totally disabled.

8. Whether the Claimant's total disability is due to pneumoconiosis.

POSITIONS OF THE PARTIES

Claimant's Contentions

The Claimant, through counsel, contends that his claim for benefits was timely filed because the presumption that his claim was timely has not been rebutted by evidence that he received notice of disability due to pneumoconiosis more than three years before filing his claim.

The Claimant argues that the chest x-ray evidence of record establishes that he suffers from pneumoconiosis. Further, he argues, Dr. Simpao's well-reasoned and well-documented medical opinion that he suffers from coal workers' pneumoconiosis is sufficient to establish that he has pneumoconiosis. The Claimant also argues that Dr. Simpao's medical opinion is sufficient to establish that he is totally disabled due to pneumoconiosis.

Employer's Contentions

The Employer, through counsel, contends that the Claimant does not have pneumoconiosis based on the negative chest x-ray interpretations of Dr. Rosenberg, Dr. Broudy, and Dr. Kendall, who it contends are more qualified than Dr. Simpao. The Employer argues that Dr. Simpao's medical opinion also fails to establish the existence of pneumoconiosis, as it is not well-reasoned or well-documented, unlike the opinions of Dr. Rosenberg and Dr. Broudy. The Employer further argues that the Claimant has failed to establish that he is totally disabled under any if the criteria in 20 C.F.R. §718.204, much less disabled from pneumoconiosis.

The Employer also contends that it is not the responsible operator liable for the Claimant's benefits, if he is entitled to benefits. It argues that it was not an operator because it did not have power or control over the coal mine and because it only had de minimus and sporadic contact with a mine.

Director's Contentions

The Director, through counsel, filed a Motion for Partial Summary Decision on January 8, 2007, with regard to the designation of the Employer as responsible operator. The Director contends that there is no genuine issue of material fact related to the Employer's designation as responsible operator as the Claimant received wages from the Employer, which is prima facie evidence of right to direct, control, or supervise his work. Additionally, the Director alleges, the

evidence shows: (1) the Claimant worked for the Employer for a period of not less than one year; (2) the Claimant was exposed to coal dust while working for the Employer; (3) the Claimant worked for the Employer for at least one day after December 31, 1969; (4) the Employer was an operator after June 30, 1973; and (5) the Employer is capable of assuming liability for benefits. In fact, the Director points out, on September 19, 2003, the Employer, through its Carrier, admitted all of these things except that the Claimant was exposed to coal dust while working for the Employer.

Moreover, the Director also argues that the Employer has waived its right to contest its designation as responsible operator because it failed to timely respond to the Director's July 16, 2003, Schedule for the Submission of Additional Evidence ("Schedule") pursuant to 20 C.F.R. § 725.412.

ADMISSIBILITY OF EVIDENCE

I. Evidence Relating to Employer's Designation as Responsible Operator

Pursuant to the Regulations, a potentially liable operator may not contest its liability for the payment of benefits on the grounds set forth in 20 C.F.R. § 725.408(a)(2)(i)-(v), if it fails to respond to the Notice of Claim within thirty days of its issuance. 20 C.F.R. § 725.408(a)(3) (2004). Additionally, the designated responsible operator is deemed to have waived its right to contest its liability if it fails to respond to the schedule issued pursuant to 20 C.F.R. § 725.410 within thirty days. 20 C.F.R. § 725.412(a) (2004). Moreover, "[i]n accordance with the schedule issued by the district director, all parties shall notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. § 725.414(c) (2004). If this notice is not provided, "testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim" unless excused by the administrative law judge due to "extraordinary circumstances." *Id.* (emphasis added); *see also* 20 C.FR. § 725.457(c)(1) (2004).

For the reasons discussed below, the Employer failed to timely respond to the notices of claim and is barred from contesting liability on the grounds of 20 C.F.R. § 725.408(a)(2)(i)-(v). The Employer also failed to respond to the Schedule within thirty days of its issuance on July 16, 2003, so it has waived its right to contest liability. Additionally, pursuant to the Schedule, the Employer was required to submit the name and current address of any potential witness pertaining to its liability as the potentially liable operator by September 14, 2003. (DX 20.) However, the Employer failed to submit the names of any potential witnesses by that date. Therefore, any hearing testimony relevant to the Employer's liability is inadmissible absent extraordinary circumstances. This Administrative Law Judge finds that there are no extraordinary circumstances here that excuse the Employer's failure to identify potential witnesses according to the schedule. The Employer received the schedule and had notice of the time limitations therein. (DX 20.) The Employer was also aware by virtue of the schedule that a failure to submit potential witness's names would result in any testimony at hearing relevant to its liability being inadmissible. (DX 20.)

Accordingly, although Mr. Halcomb was permitted to testify at the hearing, this Administrative Law Judge now finds that his testimony inadmissible pursuant to 20 C.F.R. §§ 725.408(a)(3), 725.412(a)(2), and 725.414(c).

II. Medical Evidence

Pursuant to the Regulations, the responsible operator may only submit up to two chest x-ray interpretations in support of its affirmative case. 20 C.F.R. § 725.414(a)(3)(i). The evidentiary limitations contained in 20 C.F.R. § 725.414 are mandatory and cannot be waived by the parties. *Smith v. Martin County Coal Corp.*, 23 B.L.R. 1-69 (2004). Any "[m]edical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. § 725.456(b)(1) (2004). Recently, the Board ruled that if a party wishes to submit evidence in excess of the evidentiary limitations, that party must make a showing of good cause. *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141, 1-146 (2006). If the party does not attempt to show good cause, the Board has deemed the issue waived. *Id.* In *Brasher*, the Board noted that the administrative law judge is not obligated *sua sponte* to make an independent assessment as to whether good cause exists to admit the excess evidence. *Id.* at 1-146-1-147 n. 3.

In this case, the Employer submitted a pre-hearing report designating the chest x-ray interpretations by Dr. Rosenberg and Dr. Broudy as affirmative evidence. (ALJX 7.) These chest x-ray interpretations are within the evidentiary limitations of 20 C.F.R. § 725.414. However, at the hearing Employer's counsel submitted a chest x-ray interpretation by Dr. A. Poulos, M.D., which is in excess of the evidentiary limitations. (EX 8.) The Employer has not attempted to show good cause as to why this interpretation should be considered, nor did it even rely on this interpretation in its post-hearing brief. Further, the interpretation is merely cumulative evidence that is not outcome determinative. Therefore, although EX 8 was admitted at the hearing, this Administrative Law Judge now finds Dr. Poulos's chest x-ray interpretation inadmissible as exceeding the evidentiary limitations of 20 C.F.R. § 725.414(a)(3)(i), and it will not be considered as part of the record.

DISCUSSION OF RELEVANT ADMISSIBLE EVIDENCE

Hearing Testimony:

Claimant's Testimony (TR 10 – 48)

On direct examination, the Claimant testified that he was born on May 7, 1944, and is 5'9" tall. He did not know how much he currently weighed, but stated that his weight has decreased some over the past three to four years. He testified that his wife is dead and he has no dependents. He reported that he completed seventh grade and went to eighth grade, but did not complete it. He stated that he can read and write, but he does not have a GED and does not have any vocational training.

The Claimant reported that he has been a cigarette smoker on and off since he was fifteen or sixteen. He currently smokes about a half a pack per day, but he used to average about a pack per day. He could not estimate how many years he has smoked in total.

The Claimant stated that he worked for Daisy Fuel in Hazard, Kentucky, where he cleaned railroad cars, shoveled, and cleaned up. He testified that he was exposed to coal dust at that time and he breathed it in every day. In 1987, he testified, he began working for McCoy Coal Company and he worked there from 1987 to 1990. He started out picking rock at Walnut Branch and was exposed to coal dust from coal moving along and falling off the conveyor belts. He stated that he breathed in dust on a regular basis. He reported that he then worked at a surface mine, where he cleaned coal and was a blaster's helper. He stated that he drove a tractor with a big brush on the front that cleaned and swept the coal. The tractor had an open cab, the Claimant reported, and coal dust would come up and hit him in the face so that it looked like he worked underground all day and he breathed the dust in on a regular basis.

In 1994 and 1995, the Claimant testified, he worked for Hubb Coal. He stated that he was a night watchman, but also had to shovel the belt to keep it clean. He reported that the belt was running all the time and coal was coming out and spilling on the ground. He stated that it was always dusty and he breathed the dust on a regular basis.

After leaving Hubb Coal in 1995, the Claimant reported, he went to work for Mountaintop Hydroseeding ("Moutaintop"), although he could not remember exactly when he started. He reported that he then worked for the Respondent Employer in 1997 and 1998. He thought he worked there for over a year, but he could not remember the exact dates. At both jobs, he shoveled belt lines, put in belt rollers, swept the loadout after the trains and cleaned up dust, and there was some heavy work involved. He reported that there was dust and he breathed it during every work shift.

The Claimant testified that he did not work anywhere else after leaving the employment of the Respondent Employer. He reported that he left because he hurt his knee. He stated that he filed for and was awarded Social Security disability benefits.

When he left the Employer, the Claimant testified, he was having trouble breathing and it has continued to worsen up to the present. He reported that he cannot go up steps and he runs out of breath quickly. He stated that he could not climb a mountain and has problems walking on a level surface because his legs hurt and he runs out of breath and gets winded easily, so he has to walk slowly. He also has trouble breathing at night and uses two pillows. He reported that he smothers and gets up at least seven or eight times a night when he starts coughing and wheezing. He stated that he sometimes has a productive cough, but sometimes his cough is dry. He also stated that he cannot stand to be around dust, fumes, smoke, paint, or anything of that nature because it causes him to smother. He testified that he cannot afford to get treatment for his breathing and that it has gotten so bad that he did not think he could hold any job now.

On cross-examination by the Employer's counsel, the Claimant testified that on a usual day, he and another person would be instructed to shovel coal where it spilled at the crusher and clean up the dust. If a train came in, he stated, they would have to clean up coal dust from where the

trains were loaded out and the dust could be two inches deep. The Claimant stated that the big belt line was about a quarter of a mile long, but the other was not as big. He reported that he worked part of the time at the tipple and the rest of the time he was underground, shoveling the tunnel. At the tipple, the Claimant explained, he shoveled coal that spilled off the belt line and whatever else he was told to do.

If he had not sustained a leg injury causing him to quit work, the Claimant felt that he would have had to quit working at Blue Diamond shortly afterward because of his breathing. He thought he would not have been able to work much longer because he would lose his breath when trying to climb. He reported that when he hurt his knee, he told a boss at Blue Diamond, but did not remember who he told. He did not know if the accident report was filled out the same day, but he stated that Blue Diamond was supposed to fill one out. The Claimant testified that since his knee injury, he has not worked anywhere else.

The Claimant reported that he told the doctors he saw at a clinic he was short-winded and they told him to try to lose weight. None of the doctors at the clinic, he testified, told him he was disabled because of breathing coal dust. However, a doctor in Bowling Green told him he was in "bad shape." He stated that another doctor told him he was disabled because of his breathing, but he could not remember the doctor's name or where he was located. He could not remember for sure if he had seen that doctor before or after he saw the doctor in Bowling Green, but he did not think any doctor had told him he was disabled before he went to Bowling Green. He stated that he never told any doctor he could not work anymore because of his breathing.

The Claimant was also cross-examined by the Director's counsel and questioned by this Administrative Law Judge. However, as the testimony was only relevant to the Employer's liability, it is inadmissible.

Medical Evidence:

Chest X-Ray Interpretations

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than one centimeter) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2004). The following table summarizes the x-ray findings admitted into evidence in this case.

Exhibit Number	Submitting Party/Purpose	Physician	Qualifications[5]	Date of X-Ray	Date of Reading	Reading	Film Quality
DX 10	Claimant/Initial	Dr. Simpao	None	6/20/02	6/20/02	1/1	1
DX 11	Director/Quality	Dr. Barrett	B/BCR	6/20/02	8/10/02	QUALITY ONLY	1
EX 1	Employer/Initial	Dr. Rosenberg	B	3/20/06	3/20/06	0/0	1
EX 3	Employer/Initial	Dr. Broudy	B	10/21/03	10/21/03	0/0	1
EX 4	Employer/Rebuttal	Dr. Kendall	B/BCR	6/20/02	5/31/06	0/0	1

Biopsy and Autopsy Evidence

Biopsies and autopsies may be used to establish the existence of pneumoconiosis. 20 C.F.R. § 718.202(a)(2). However, this section is inapplicable here, as there is no biopsy or autopsy evidence in the record.

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The most frequently performed tests measure forced vital capacity ("FVC"), forced expiratory volume in one second ("FEV1") and maximum voluntary ventilation ("MVV"). Unless there is contrary probative evidence, a miner qualifies for total disability on the basis of pulmonary function studies if the FEV1 is equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, **and** either the FVC or MVV is equal to or less than the applicable table value or the FEV1/FVC ratio is 55% or less. 20 C.F.R. § 718.204(b)(2)(i) (2004). The following chart summarizes the results of the pulmonary function studies admitted as evidence in this case.

Exhibit Number	Submitting Party/ Purpose	Physician	Date of Study	Age/ Height	Tracings/ Flow Volume Loop?	Pre (*Post*) FEV1 (liters)	Pre (*Post*) FVC (liters)	Pre (*Post*) FEV1 %	Pre (Post) MVV (liters/ min.)	Pre (*Post*) Qualifying?
DX 10[6]	Claimant/ Initial	Dr. Simpao	6/20/02	58/ 67"	Yes/Yes	1.98 (*None*)	2.87 (*None*)	69% (*None*)	36 (*None*)	No

[5] Each physician's qualifications were obtained from their curriculum vitae or, if not in the record, by judicial notice of the list of readers issued by the National Institute of Occupational Safety and Health ("NIOSH"). The physicians' qualifications are abbreviated as follows: A = A-reader; B = B-reader; BCR = Board-certified in radiology.

[6] These test results were reviewed by Dr. N. K. Burki, M.D., who considered them unacceptable because they failed to meet the requisite technical quality standards applicable when the evidence was submitted. (DX 10.) First, Dr. Burki noted, the "curve shapes indicate suboptimal effort." (DX 10.) Second, the study was improperly performed because there were "incomplete flow/volume loops." (DX 10.)

EX 1	Employer/ Initial	Dr. Rosenberg	3/20/06	61/ None listed	Yes/Yes	2.00 (*2.26*)	2.96 (*3.37*)	67% (*67%*)	65 (*88*)	No (*No*)
EX 3	Employer/ Initial	Dr. Broudy	11/18/03	59/ 68"	Yes/Yes	2.02 (*2.32*)	2.91 (*3.10*)	69% (*75%*)	60 (*62*)	No (*No*)

Arterial Blood Gas Studies

Blood gas studies measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a) (2004). The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. Unless there is contrary probative evidence, a miner qualifies for total disability if an arterial blood gas study yields values equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. 20 C.F.R. § 718.204(b)(2)(ii). If the resting results do not satisfy Appendix C, the miner must be offered an exercise blood gas test, but exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b). The following chart summarizes the arterial blood gas studies admitted as evidence in this case.

Exhibit Number	Submitting Party/ Purpose	Physician	Date of Study	Altitude	Resting (*Exercise*) pH	Resting (*Exercise*) PCO_2 (mmHg)	Resting (*Exercise*) PO_2 (mmHg)	Resting (*Exercise*) Qualifying?
DX 10	Claimant/ Initial	Dr. Simpao	6/20/02	0-2999'	7.39	45.3	79.1	No
EX 1	Employer/ Initial	Dr. Rosenberg	3/20/06	0-2999'	7.372 (*7.35*)	43.5 (*46.2*)	77.6 (*77.3*)	No (*No*)
EX 3	Employer/ Initial	Dr. Broudy	11/18/03	0-2999'	7.41	43.8	64.6	No (*No*)

CT Scans

CT scans may be used to diagnose pneumoconiosis and other pulmonary diseases. The regulations provide no guidance for the evaluation of CT scans. They are not subject to the specific requirements for evaluation of x-rays, and must be weighed with other acceptable medical evidence. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31, 1-33-1-34 (1991). The record in this case contains one CT scan of the Claimant's chest, which was performed by Dr. Poulos. (EX 9.) He reported that the results showed no evidence of coal workers' pneumoconiosis. (EX 9.)

Medical Reports

Dr. V. Simpao – June 20, 2002 (DX 10)

Dr. Simpao performed the Department of Labor sponsored evaluation on June 20, 2002. The Claimant complained of frequent colds, wheezing attacks at night for the past three to four years, arthritis, and allergies. He also complained of dyspnea on exertion for five years, chest pain and tightness on exertion since 1989, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea for four years. He reported that he noticed a change in his breathing at 100 feet, could only climb a few steps before becoming short of breath, and could only lift twenty pounds before becoming short of breath. Dr. Simpao noted that the Claimant was currently smoking about one and one-half packs of cigarettes per day and had started smoking around 1964. He also noted that the Claimant worked for four years in underground mines and eight years at the mine surface.

On examination, Dr. Simpao reported that the Claimant was 67" tall and weighed 207 pounds. His pulse was seventy-two beats per minute, respiration was twenty, and his blood pressure was 132/86 on the right and 147/81 on the left. The Claimant had no clubbing or edema, his color was plethoric, and his lips and nails were slightly cyanotic. On examination of his lungs, Dr. Simpao noted that the Claimant had "crepitation with distant breath sounds & expiratory wheezes" with increased resonance in the upper chest and axillary areas. The Claimant was able to walk 100 feet and climb eight stairs before becoming short of breath.

Dr. Simpao then reviewed the Claimant's diagnostic testing. He read the Claimant's x-ray as category 1/1. He reported that spirometry indicated "a moderate degree of restrictive and obstructive airway disease." The Claimant's FEV1 was 58% of predicted and his FVC was 67% of predicted. Dr. Simpao noted that the Claimant's arterial blood gas study was normal. He diagnosed coal workers' pneumoconiosis category 1/1 and stated that "multiple years of coal dust exposure is medically significant in his pulmonary impairment," which he classified as moderate. Dr. Simpao opined that the Claimant had moderate occupational lung disease caused by coal mine employment and that he did not have the respiratory capacity to return to coal mine employment or perform comparable employment in a dust-free environment.

Dr. D. Rosenberg, M.D. – March 31, 2006 (EX 1)

Dr. Rosenberg evaluated the Claimant on March 20, 2006. The Claimant complained that he "felt 'bad' and weak" and had "no wind." He reported worsening breathing problems, leg swelling, coughing, and wheezing. He stated that he used two pillows and would wake up at night short of breath. He had little phlegm production. Dr. Rosenberg noted that the Claimant was taking Zyprexa, Xanax, and Lipitor and that he had been prescribed respiratory medications but could not afford them. He also noted that the Claimant had been a smoker since he was in his 20s, smoking about a pack of cigarettes per day. The Claimant told Dr. Rosenberg he had been around coal mines his entire life, but did not know how many years he had been given credit for. He reported that his last job was underground and he had also installed belt lines, swept rock dust, loaded coal on strip jobs, was a blaster's helper, and operated equipment. He also reported that he had worked sandblasting gravestones for many years. He stated that he did not use respiratory protection at any job.

On examination, the Claimant was in no distress. His blood pressure was 150/90, his pulse was eighty beats per minute and his respiratory rate was sixteen breaths per minute and unlabored. Dr. Rosenberg noted no use of accessory muscles to breathe and that the Claimant had occasional rhonchi, but no wheezes or rales. Dr. Rosenberg detailed the results of the Claimant's arterial blood gas study and pulmonary function test which are set out in the charts above. During the exercise portion of the arterial blood gas study, the Claimant's heart rate rose from seventy beats per minute to 103 beats per minute. During the pulmonary function test, before bronchodilators, the Claimant's FVC was 71% of predicted, his FEV1 was 60% of predicted, and his MVV was 54% of predicted. After bronchodilators, his FVC was 80% of predicted, his FEV1 was 67% of predicted, and his MVV was 73% of predicted. His TLC was 103% of predicted with an RV/TLC of 164% of predicted and his diffusing capacity, which was corrected for lung volumes, was 112% of predicted. His flow-volume curve was consistent with significant obstruction. His EKG was normal and on review of his chest x-ray, Dr. Rosenberg read it as a 0/0 and stated that it did not show opacities related to past coal dust exposure, but there was borderline cardiomegaly. The impression from the CT scan was that there was no evidence of coal workers' pneumoconiosis.

Dr. Rosenberg opined with a reasonable degree of medical certainty that, based on the examination, the Claimant "does not have the clinical form of coal workers' pneumoconiosis." Further, he opined that the Claimant's airflow obstruction was related "to his long and continued cigarette smoking," which appeared to be quite heavy based on his elevated carboxyhemoglobin levels. He stated that coal mine dust can cause an obstruction but when it does, a significant bronchodilator response and airtrapping are not expected, and the Claimant demonstrated both. He stated that the Claimant's obstruction was not disabling and that he "could perform his previous coal mining job or similarly arduous types of labor."

Dr. B. Broudy, M.D. – November 18, 2003 (EX 3)

Dr. Broudy evaluated the Claimant on November 18, 2003. The Claimant complained of shortness of breath, cough with a small amount of sputum, trouble sleeping, and wheezing when lying down. He told Dr. Broudy he had had trouble breathing for several years and had shortness of breath when he was working, but he could not recall how bad it was then. He reported that he had not been to a doctor or hospital for his breathing problems and was not taking medication for his breathing. He told Dr. Broudy that he has smoked since he was in his twenties and smoked up to a pack per day, although he reported that he had cut down to about a half a pack per day recently.

Dr. Broudy noted the Claimant's work history included more than fifteen years as a sandblaster where he was exposed to silica dust, five or six years of strip mining as a blaster's helper and cleaning coal, and four years at Blue Diamond doing general labor and shoveling at the load out. He also noted that the Claimant left work because of his knee injury, but that he could not remember exactly when it occurred. The Claimant reported that he has been limited by knee problems after injuring it at work and undergoing arthroscopic surgery.

On physical examination, Dr. Broudy noted that the Claimant was 68" tall and weighed 213 pounds. The Claimant's blood pressure was 140/70 and his pulse was eighty. His respirations

were unlabored, his chest expansion was normal, and his lungs were clear, although there may have been expiratory delay. He had a regular heart rhythm with no murmurs, rubs, or gallops. He had no cyanosis, clubbing, or edema in his extremities. He reviewed the Claimant's October 21, 2003, chest x-ray and noted that it was of good diagnostic quality. He reported that the x-ray was normal with no signs of pneumoconiosis and categorized it as 0/0 or negative.

Dr. Broudy performed spirometry and an arterial blood gas study on the Claimant during the evaluation. He noted that the Claimant gave variable effort during his spirometry test and gave particularly weak effort for the MVV. The results of the spirometry and arterial blood gas study are set out in the charts above. During the spirometry test, before bronchodilators, the Claimant's FVC was 66% of predicted, his FEV1 was 58% of predicted, and his MVV was 41% of predicted. After bronchodilators, his FVC was 70% of predicted, his FEV1 was 66% of predicted, and his MVV was 46% of predicted. Dr. Broudy reported that the Claimant showed improvement after bronchodilators, but had signs of mild restriction and obstruction. He noted that the results exceeded the minimum disability levels for coal workers. The Claimant's arterial blood gas study showed moderate hypoxemia and elevated carboxyhemoglobin level of 6.0%, which indicated continued exposure to smoke.

Dr. Broudy's diagnosis was obesity, right knee injury, and "chronic bronchitis with mild chronic obstructive airways disease." He opined that the Claimant did not have "coal workers' pneumoconiosis, silicosis or any chronic lung disease caused by the inhalation of coal mine dust or silica dust." He further opined that the Claimant had the respiratory capacity to perform coal mine work or similar manual labor. He stated that the Claimant did show evidence of chronic obstructive airway disease as the result of cigarette smoking and predisposition to asthma.

Testimony

Deposition of Dr. Rosenberg – June 7, 2006 (EX 2)

Dr. Rosenberg was deposed on June 7, 2006. He testified that he is a pulmonary specialist and an occupational medicine specialist, which means he evaluates and treats patients with lung problems and work-related conditions. He stated that he sees patients on a daily basis. He testified that he has a medical license in Kentucky and has privileges at Pikeville Methodist Hospital. He later testified that he is a B-reader and a copy of his curriculum vitae was marked as Deposition Exhibit 1.[7]

Dr. Rosenberg testified that he is familiar with the federal rules and regulations governing black lung claims. He stated that he takes them into consideration when examining claimants and testifying in black lung cases. When performing evaluations, he reported, he takes a complete medical, social, and family history, a history of the present illness, notes complaints, reviews

[7] Dr. Rosenberg received his medical degree from Case Western Reserve University. He is currently the Director of Occupational Medicine, Director of the Executive Wellness Program, and Director of Employee Health for University Hospitals Health System. He is also in private practice in Ohio. He is licensed in Ohio, Kentucky, and Indiana and is Board-Certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine. He has been a NIOSH-certified B-reader since July 1, 2000, and his most current certificate was included with his curriculum vitae.

symptoms, conducts an examination focusing on the respiratory system, and orders diagnostic tests, such as chest x-rays, arterial blood gas studies, pulmonary function tests, and EKGs. He estimated that he spends about a half hour with the patient, which includes the questioning and physical examination. He stated that he reviews the x-rays and any old records sent to him to objectively evaluate and verify the person's past medical history. After reviewing everything, including the physical examination, he prepares a report summarizing his findings.

Dr. Rosenberg stated that the point of the physical examination is to assess the person's respiratory system to look for evidence of breathing problems or other medical condition affecting the lungs. First, he looks at the person's respiratory rate, vital signs, and whether they are using their accessory muscles, because usually one does not use these muscles to breathe. He also looks at chest expansion, taps on the chest to hear if air is trapped, and listens for rales, rhonchi, wheezes, or any other abnormal sounds in the chest. He explained that rhonchi is congestion of the larger airways and wheezes cause "a musical sound on exaltation, a whistling sound." Rales, he explained, cause a crackling sound that may be heard when a person who has fluid, congestion, or inflammation in the air sacs of the lungs takes a deep breath in. He stated that he also looks for cyanosis, which is blueness of the nail caused by low oxygen levels, and clubbing, which is a rounding of the nails that occurs with certain lung conditions such as silicotuberculosis.

Coal workers' pneumoconiosis or any other respiratory condition, Dr. Rosenberg reported, can cause the above abnormalities. He stated that coal workers' pneumoconiosis generally causes crackles or rales, which are heard on breathing in, while smoking causes abnormalities such as rhonchi and wheezing, which are heard on breathing out. He reported that coal workers' pneumoconiosis causes micro-nodules that are mainly in the upper lung and are usually centrally-located. Over time, he stated, the micro-nodules can form "conglomerate nodules," which are the complicated form of coal workers' pneumoconiosis.

Dr. Rosenberg testified that there are other diseases that look like coal workers' pneumoconiosis on x-ray and that can cause findings similar to coal workers' pneumoconiosis, which is why the medical history is so important. Based on the physical examination, medical history, and diagnostic tests, he stated, he can rule out certain conditions to make "the most likely and probable diagnosis."

Pulmonary function studies, Dr. Rosenberg explained, analyze "the ability of air to get in and out of the lung, called ventilation; and also an assessment of oxygenation, the ability for oxygen to get into the bloodstream." He stated that spirometry is designed to measure ventilation, while diffusing capacity is designed to measure oxygenation, and in a thorough evaluation, he would want to perform both. He reported that a flow volume loop is the curve produced when the person takes a deep breath in and blows out during spirometry. It is an objective way, he stated, to determine whether the person is trying their best and hardest to perform the test, since cooperation is "critically important." To determine if the study is valid, he reported, he looks for a sharp increase and decrease in flows and he looks at the numbers to make sure they are consistent and within the five percent of variation for the FVC and FEV_1. He stated that if someone has not tried their best, but the values are still normal, the test is still adequate to assess the person's pulmonary function.

Dr. Rosenberg testified that coal workers' pneumoconiosis is a fixed disease and he would not expect to see improvement in pulmonary function after a bronchodilator. He stated that if the person improved after bronchodilators, it is more likely asthma or asthmatic bronchitis, which is not related to coal workers' pneumoconiosis. He also stated that old pulmonary function studies are important as well, because if there are improvements from one test to the next, it does not follow the pattern of interstitial lung disease relating to coal workers' pneumoconiosis or a related impairment. He testified that he would not expect to see improvement over time with coal workers' pneumoconiosis.

In spirometry, Dr. Rosenberg stated, there are two patterns of abnormalities: restriction, which means small lungs, and obstruction, which is a decrease in airflow. He reported that the interstitial form of coal workers' pneumoconiosis is restrictive, so he looks for small lung volumes. Coal workers' pneumoconiosis, he testified, can also cause airflow obstruction, so he looks at the x-rays to correlate the obstruction to coal workers' pneumoconiosis. He reiterated that an obstruction caused by coal workers' pneumoconiosis would not improve after bronchodilators. He further reported that the obstructions seen with COPD-related coal workers' pneumoconiosis are not the same kind of obstructions seen with the severe form of COPD with negative or minimally abnormal x-rays.

Dr. Rosenberg testified that arterial blood gas studies look at the ability to oxygenate blood. He stated that CO_2 is also measured, which relates to ventilation, but oxygenation is the main purpose. With the interstitial form of coal workers' pneumoconiosis, he stated, there is a decrease in PO_2 which worsens with exercise. He reported that the most important blood gas study is during or post-exercise. If the person's PO_2 rises with exercise, he explained, it "means that the alveolar capillary bed at the air sac level is intact and is functioning normally and an increase in PO_2 would be an indication that there really is no interstitial lung disease occurring in that individual."

Dr. Rosenberg testified that the person's coal dust exposure and cigarette smoking history is very important. He stated that if a person had eight years of coal dust exposure history, he would not assume there is no radiographic evidence of coal workers' pneumoconiosis, but it would be unlikely. He reported that it is possible for someone with limited exposure to develop coal workers' pneumoconiosis.

Dr. Rosenberg stated that he would want to see a person's later medical records to look for progression and certain patterns of an illness. He testified that he expects to see progression over time with coal workers' pneumoconiosis rather than improvement. He described coalescence as a situation "where the small little nodules are starting to come together but haven't totally formed a mass like situation. You can still see the individual small micro nodules."

Dr. Rosenberg testified that he examined the Claimant on March 20, 2006. He reported that he took the Claimant's personal history, his present and past family, social, work, and exposure histories, conducted a physical examination, and ordered a pulmonary function test, chest x-ray, EKG, and arterial blood gas study. He stated that the Claimant told him he had worked about twenty-five years in the coal mines, which Dr. Rosenberg stated is a sufficient exposure history

to develop coal workers' pneumoconiosis. He also stated that the Claimant reported he had smoked about a pack of cigarettes per day for approximately forty years. He noted that the Claimant's carboxyhemoglobin level, a measure of the amount of carbon monoxide in the bloodstream, was 7.5% and that cigarette smoking is one of the most common causes for elevation.

On physical examination, Dr. Rosenberg stated, the Claimant had some chest congestion and an auscultatory finding of rhonchi. He testified that these findings were consistent with bronchitis, not abnormalities resulting from inhaling coal dust. He reported that the Claimant's chest x-ray was "considered a 0/0 for the presence of any micronodularity related to coalmine dust exposure. There were no findings related to dust." He noted that the x-ray did show that the Claimant's heart was "borderline enlarged," but it was otherwise negative. He testified that the x-ray was of good diagnostic quality and that he personally interpreted it. He reported that he performed a CT scan, which also did not show any micronodularity, confirming the x-ray reading. He stated that, although a CT scan cannot be categorized like an x-ray, the absence of micronodularity on the CT scan is equivalent to a 0/0 x-ray. CT findings are important, Dr. Rosenberg testified, because they confirm that the Claimant does not have clinical coal workers' pneumoconiosis.

To measure pulmonary function, Dr. Rosenberg stated, he does not consider the physical examination, chest x-ray, or CT scan because x-rays and CT scans look at structure, rather than function. He reported that he performed both diffusing capacity and spirometry tests for pulmonary function. He stated that diffusing capacity is measures the ability of oxygen to get into the blood and that the Claimant's capacity was 112% of predicted, corrected for lung volume, which is normal. He reported that the Claimant's spirometry test revealed moderate airflow obstruction and he discussed the results, which are set out in the charts above. However, he testified, since the Claimant showed improvement after bronchodilators, his airflow obstruction has a reversible component, meaning he does not have a permanent obstruction or impairment. Based on the results of the pulmonary function studies, Dr. Rosenberg testified, the Claimant is not disabled from a respiratory standpoint.

With regard to the blood gas studies, Dr. Rosenberg reported that the Claimant had a "mild degree of resting hypoxemia or decreased in PO_2 which did not change with exercise." He stated that this was associated with an elevated carboxyhemoglobin level, which is associated with smoking more than a pack of cigarettes per day. The Claimant did not have a drop in his PO_2 level on exercise, Dr. Rosenberg reported, which is important because it shows that the Claimant's ability to transfer gas is intact with exercise, which in turn "correlates with the absence of interstitial scarring in the lungs." He stated that these functional findings were consistent with the structural findings of the chest x-ray and CT scan of no interstitial changes from coal workers' pneumoconiosis. He later testified that the Claimant was still smoking at the time of the evaluation and that the Claimant's arterial blood gas studies were consistent with that fact.

Dr. Rosenberg opined that, based on his entire evaluation, the Claimant does not have medical or legal coal workers' pneumoconiosis and he explained the difference between the two types. He also opined that the Claimant has no impairment related to coal dust exposure. He stated that he would not change his opinion even if the Claimant was found to have simple coal workers'

pneumoconiosis because the Claimant's functional abilities on testing were well above disability standards and were only in the "mild impairment" range.

Additionally, Dr. Rosenberg testified that the Claimant is not disabled from a respiratory or pulmonary standpoint. He opined that the Claimant had the respiratory capacity to work in and around the mining industry as a miner. He stated that he was aware that the Claimant had worked at the belt line, installed belt lines, swept rock dust, operated equipment at coal mines, worked strip mine jobs, and had worked as a blaster's helper. He testified that he was familiar with the physical requirements of those jobs from a respiratory standpoint and took those into consideration when giving his opinion. Dr. Rosenberg stated that his opinion regarding the Claimant's respiratory disability would not change even if the Claimant had radiographic evidence of simple coal workers' pneumoconiosis, based on the results of the pulmonary function tests. He further stated that he would not change that opinion even if it was stipulated that the Claimant had coal workers' pneumoconiosis. He testified that all his opinions were based on a reasonable degree of medical certainty.

On cross-examination, Dr. Rosenberg testified that the Claimant complained of wheezing, phlegm production, waking up at night with shortness of breath, and some shortness of breath during the day. He confirmed that the Claimant did have an obstructive defect and that inhalation of coal dust and coal workers' pneumoconiosis can cause an obstructive defect. He testified that he did not note any other abnormalities on the Claimant's chest x-ray other than the borderline enlarged heart.

Other Evidence

Curriculum Vitae of Dr. Simpao (CX 1)

Dr. Simpao received his medical degree from the University of Santo Tomas. He is licensed in Kentucky and is Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease. He is currently the medical director of the Coal Miners' Respiratory Clinic at the Muhlenberg Community Hospital, a Medical Consultant at Community Health Centers of Western Kentucky, and is in private practice.

Curriculum Vitae of Dr. P. Barrett (DX 11)

Dr. Barrett received his medical degree from Tufts University School of Medicine. He is Board-certified in radiology and is a NIOSH-certified B-reader. He is currently a clinical professor of Radiology at Tufts University, and the Director of Radiologic Services at the Massachusetts Respiratory Hospital.

Curriculum Vitae of Dr. Broudy (EX 5)

Dr. Broudy received his medical degree from Washington University School of Medicine. He is licensed in Kentucky and is Board-certified in Internal Medicine with a subspecialty in Pulmonary Medicine. He is also certified by the National Board of Medical Examiners and is

NIOSH-certified B-reader. He is currently the staff pulmonologist at Lexington Clinic and an attending physician at St. Joseph Hospital and St. Joseph Hospital East.

Curriculum Vitae of Dr. Kendall (EX 6)

Dr. Kendall received his medical degree from the University of Kentucky College of Medicine. He is licensed in Kentucky and is certified by the American Board of Radiology. He is currently a radiologist at Pikeville Radiology.

Curriculum Vitae of Dr. Poulos (EX 10)

Dr. Poulos received his medical degree from the University of Kentucky. He is Board-certified in Diagnostic Radiology and is a NIOSH-certified B-reader. He is currently a radiologist at Pikeville Radiology.

Deposition of the Claimant – December 14, 2005 (EX 7)

The Claimant was deposed on December 14, 2005. On examination by the Employer's counsel, he testified that he was born on May 7, 1944, and was sixty-one years old. He reported that he is five feet nine inches tall and weighed two hundred and ten pounds. He stated that he was about ten pounds heavier than his usual weight and he had gained the ten pounds in about a year. He testified that his wife is dead and that he does not have any children that are dependent on him for support. He reported that he went to school until the eighth grade and never received a GED or any other education beyond eighth grade. He stated that he was in the Army and was honorably discharged in 1967. He testified that he did not have any vocational training while in the Army, nor after he was discharged.

The Claimant testified that he was not currently working, but was receiving $626 per month in Social Security Disability benefits. He further testified that he did not have any other source of income and was not getting a pension from any company. He was not sure how long he had been getting Social Security benefits, but thought it had been for about three years. He stated that he was receiving benefits because of his leg, back, and lungs. He testified that he injured his back while lifting something when he worked at Hindman Monument Company. He stated that the doctor told him he slipped a disc, but he did not have to have surgery. He could not remember what year he was injured. He testified that he hurt his knee while working for the Respondent Employer. He stated that he pulled and twisted his knee while standing in a boat helping to lift a spray bar and had to have surgery.

The Claimant testified that his last job was with the Respondent Employer and later stated that he did not work for anyone else after leaving the Employer. He could not remember what years he worked, but stated that he thought he worked for the Employer for just over a year and that the last year he worked was 1998. He reported that the only records he had of the time he worked for the Employer were his pay stubs. He later stated that January 2, 1997, through February 20, 1998, sounded like the correct time period. He stated that he left the Employer because he could not work anymore after he injured his leg on the job and it swelled up and he could not put any pressure on it. He testified that there was nothing wrong with his leg until that point. He stated

that he did not work anymore after the day he was injured. He reported that he filed a workers' compensation claim against the Employer.

The Claimant could not remember exactly how much he made while working for the Employer, but he thought it was $7.50 or $8.50 per hour. He reported that he worked five to seven days per week and that he worked seven days per week approximately every other week. He stated that he usually worked eight hours per day, but sometimes worked ten or twelve. When he worked more than eight hours a day, he stated, he was paid overtime. He reported that he was paid every week by a check that he thought came from the Employer.

Prior to working for the Employer, the Claimant stated, he worked for Mountaintop, which was a company owned by Mr. Halcomb's uncle. He reported that he did the same things for Mountaintop as he later did for the Employer. He stated that he had worked for Mr. Halcomb's uncle for about three or four years when Mr. Halcomb took over the contract. He reported that he and two or three other employees stayed on the job to work for the Employer, but at the end only he and one or two other employees remained. One of those men who worked with him at Mountaintop was still at the site, but was now working for Blue Diamond directly. He did not recall how much he was paid when he worked for Mountaintop, but thought it was about the same as his pay when Mr. Halcomb took over.

Before he worked for Mountaintop, the Claimant testified, he worked for McCoy Coal, which did mountain top coal removal. He stated that he was a blaster's helper and he cleaned and swept coal with a large sweeper attached to a tractor. He testified that he was exposed to coal dust at that job. He thought he worked for McCoy for about four years and he could not recall his hourly rate of pay. Prior to working for McCoy, the Claimant worked for Walnut Branch Coal Company, where he picked rock. He did not remember how long he worked for Walnut Branch because he was moved from there to McCoy and the same owner owned McCoy and Walnut Branch.

The Claimant reported that he also worked for Hubb Corporation, which was a coal company owned by Mr. J. Hubbard. He stated that Hubb contracted for Blue Diamond and that he worked at the same job site as when he later worked for Mountaintop and the Employer. He reported that he was supposed to stay in the office so he could take injured employees to the doctor, but he also cleaned, greased, and shoveled the belts. He could not recall how long he worked for Hubb, but he did know he worked there for more than a year. The Claimant did not know how many years he had worked in and around coal mines in total.

While working for the Employer, the Claimant testified, he worked at the Blue Diamond job site. He stated that he put in belt rollers, shoveled belts, shoveled the loadout, and swept dust. He reported that he would have to sweep and shovel dust every day and that it was two inches deep. Each day, he stated, he would start at the loadout, sweeping and shoveling coal that fell off the belts, then he would go to the tunnels and shovel coal back on to the belts. He reported that this would take several hours. After that, he would go to the crusher to shovel coal and dust. He stated that he would then start the whole process over again because "where ever they've got beltlines, you've got spills." Later, he reported that, in addition to working at the loadout, he also worked in the tipple cleaning up spills.

The Claimant reported that he also sampled coal and greased the beltline at times among other jobs around the mines. He stated that when he sampled coal, he took the samples from coal dumped on the ground out of a truck. He would then take the samples to the lab, crush them, and give them to the woman that tested samples. He stated that he did not cut weeds around the mines, although he thought some of the other workers did. He also stated that he did not sweep floors in the mine office.

The Claimant testified that he did not wear a respirator or mask at work and no one provided him with one to wear. When asked if the coal had already been washed and processed, the Claimant reported that the coal came through wet at times, but not all the time.

While working at the job site, the Claimant stated, he had trouble breathing because he was working hard. He stated that he would "run out of breath real easy there." He never asked for a change in job duties because of his breathing, though. He stated that he would have continued to work if he had not sustained his knee injury. However, he testified, he did not think there was any way he could still do the job now because of his breathing problems. He stated that he was in "[t]oo bad a shape" and that he did not have the "wind" to do the job.

The Claimant testified that he had a miner's certificate at the time he worked for the Employer, but he did not know where the certificate was at the present time. He reported that his certificate was up to date when he worked for the Employer and that he took annual retraining classes then.

The Claimant testified that he has had trouble breathing for about four or five years and gets out of breath very easily. He stated that he complained about his breathing to his family doctor, Dr. Sandlin, about three or four years ago when he was seeing Dr. Sandlin for his knee. He stated that he did not get any treatment for his breathing from Dr. Sandlin, but has taken over-the-counter spray medication from the drugstore, although he could not remember the name of what he used. He had never been on oxygen or used an inhaler for his breathing. He had also never been hospitalized because of his breathing.

The Claimant reported that he has not talked to any other doctors about his breathing other than when he was sent for his evaluations in connection with his Black Lung claim. He did not recall any of the doctors' names because he had seen so many. The doctors he saw, he stated, took x-rays of his lungs, but he did not think he ever had a CT scan and he never had a lung biopsy. He stated that more than one of the doctors he saw in connection with his claim told him he had black lung, but he could not remember which doctors or where they were located. He reported that it had been one or two years since he saw those doctors. When asked about Dr. Broudy, he stated that Dr. Broudy did not tell him anything. He stated that one of the doctors told him he needed to be examined further. He testified that none of the doctors told him he was totally disabled because of black lung.

The Claimant testified that he has not had any other medical conditions besides those associated with his back, leg, and breathing. He reported that he had never had heart trouble, high blood pressure, diabetes, or cancer. He also reported that he had never had pneumonia. He did not know if he had ever had bronchitis.

The Claimant reported that he was currently a smoker and smoked about one pack per day. He stated that he started smoking when he was a teenager. He did not remember how many years he had smoked, but stated that he has quit about five or six times for three or four years at a time. The longest period of time he quit for was five years. Before his wife passed away, he reported, she had quit smoking, but she did smoke for part of their marriage. No one else in the household smoked except them.

Currently, the Claimant stated, he gets out of breath quickly if he tries to walk fast, climb stairs, or lift something heavy. He reported that he had been having problems for several years. He stated that he has a cough that sometimes produces phlegm, but he did not know what color it was. His cough, he stated, was not worse at any particular time of day, but he thought it got worse when the weather was damp. He reported that he occasionally gets some exercise walking up and down his street about a quarter of a mile. He did not know how long it took him because he had to stop at times. He also did not know how far he could walk on level ground before stopping to rest because he had never tried. He reported difficulty sleeping at night because he has trouble falling asleep and he gets up a lot from his coughing. Nothing besides the cough bothered him when he slept, though. He used Zyprexen to help him sleep, but it did not do much.

The Claimant testified that he does not mow grass, do yard work, or use a weed eater. He does not hunt, fish, or have any other hobbies. He lives alone and has a girlfriend.

On examination by his own counsel, the Claimant testified that just the tunnels he worked in were underground. He described the tunnel as a mine shaft with an underground belt line feeding the coal through. He agreed that his job was basically to clean up wherever there were belt lines. He reported that the heaviest lifting he did was putting in belt rollers, which he estimated to weigh about 150 pounds. He stated that two men would handle them and they would replace them two or three times per week on average. He confirmed that he had not worked anywhere since he stopped working for the Employer.

The Claimant testified that the over-the-counter spray he used for his breathing was a spray he would squirt up his nose. He recalled going to see a doctor in western Kentucky once, but he did not remember if that was the doctor who told him he had black lung.

On further examination by the Employer's counsel, the Clamant testified that he got a lump sum settlement award of about $2,000.00 for the workers' compensation claim he filed when he injured his knee and he is not getting any monthly payments based on that claim.

Employment Records (DX 5(a); DX 6; DX 7)

DX 5(a) contains a 1099-MISC from Mountaintop Hydroseeding, which shows that the Claimant received $14,264.50 in 1996.

DX 6 contains a payroll register from the Employer, which shows that the Claimant received paychecks from January 9, 1997, through February 27, 1998.

DX 7 contains the Claimant's Social Security Administration work record, which shows the following coal mine employment:

Year	Employer	Total Earnings
1970	Daisy Fuel	$592.63
1987	Walnut Branch Coal	$1,510.50
1987	McCoy Coal Co.	$5,581.66
1988	McCoy Coal Co.	$12,690.10
1989	McCoy Coal Co.	$19,226.95
1990	McCoy Coal Co.	$300.00
1994	Hubb Corp.	$8,290.67
1995	Hubb Corp.	$986.00
1997	C & S Construction	$18,417.41
1998	C & S Construction	$2,745.02

DISCUSSION

I. TIMELINESS

A living miner's claim is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 C.F.R. § 725.308(a). The Regulations create a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. § 725.308(c). This statute of limitations does not begin to run until the first time a doctor tells the miner he is totally disabled by pneumoconiosis, regardless of whether the miner believes he has the disease earlier. *Tenn. Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608 22 BRBS 2-291, 2-298 (6th Cir. 2001). In this case, the Claimant filed his claim for benefits on April 18, 2002. The Employer has presented no evidence that the Claimant was told he was totally disabled by pneumoconiosis more than three years before that date. Therefore, the Employer has failed to rebut the presumption of timeliness and this Administrative Law Judge finds that the Claimant's claim for benefits under the Act is timely.

II. STATUS AS A COAL MINER

Pursuant to the Regulations:

> [m]iner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19) (2004).

Moreover, the Regulations provide a rebuttable presumption that certain individuals are miners, as follows:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> >
> > (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. § 725.202(a) (2004).

At the hearing and at his deposition, the Claimant testified that, during all his periods of employment at Daisy Fuel, Walnut Branch, McCoy, Hubb Corp., Mountaintop, and the Employer, he worked in and around coal mines, cleaning and shoveling coal and sweeping dust, among other duties. (TR at 13-18, 30-31; EX 7 at 17-20, 23-24, 29-32) He further testified that he was exposed to coal dust on a regular basis during each period of coal mine employment. (TR at 13-18; EX 7 at 30.) Therefore, the Claimant is entitled to the rebuttable presumption that he was a miner when he worked for those employers. The Employer has presented no evidence to rebut that presumption. Accordingly, this Administrative Law Judge finds that the Claimant was a miner as defined by the Act and Regulations.

III. LENGTH OF COAL MINE EMPLOYMENT

Pursuant to the Regulations a year "means a period of one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." 20 C.F.R. § 725.101(a)(32). The miner is credited with one year of coal mine employment under the Act if he establishes that he "worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year." *Id.* The miner is credited with a fractional year if he worked less than 125 days based on the ratio of the number of days worked to 125. *Id.* The beginning and ending dates of the miner's employment should be determined from the record; however, if the dates cannot be ascertained, "the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year." *Id.* The coal mine industry's average daily earnings are determined by using the table contained in *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, a copy of which must be made a part of the record if used to determine the claimant's length of coal mine employment.[8] *Id.*

[8] *See* Attachment 1, *infra*.

Moreover, if "the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." *Id.*

There is nothing in the record showing how many days the Claimant worked each year when he worked for Daisy Fuel, Walnut Branch, McCoy Coal Co., Hubb Corp., or Mountaintop or his beginning and ending dates of each period of employment. However, his Social Security record shows the amount he made each year for all the employers but Mountaintop. The Claimant worked for Daisy Fuel in 1970 and his Social Security record shows he made $592.63. (DX 7.) Using the BLBA table, the Claimant is credited with 0.124 years of coal mine employment with Daisy Fuel.[9] The Claimant's next period of coal mine employment was with Walnut Branch in 1987, where he made $1,510.50. (DX 7.) Using the BLBA table, the Claimant is credited with 0.096 years of coal mine employment with Walnut Branch.[10] The Claimant's next period of coal mine employment was with McCoy Coal Co. from 1987 through 1990. (DX 7.) In 1987, the Claimant made $5,581.66, in 1988, he made $12,690.10, in 1989, he made $19,226.95, and in 1990, he made $300.00. (DX 7.) Using the BLBA table, the Claimant is credited with 2.168 years of coal mine employment with McCoy Coal Co.[11] In 1994 and 1995, the Claimant worked for Hubb Corp., where he made $8,290.67 in 1994 and $986.00 in 1995. Using the BLBA table, the Claimant is credited with 0.521 years of coal mine employment with Hubb Corp.[12]

The Claimant's Social Security record does not show the Claimant's earnings at Mountaintop, but he submitted a 1099-MISC which shows that he earned $14,264.50 while working for Mountaintop in 1996. (DX 5(a).) Using the BLBA table, the Claimant is credited with 0.76 years of coal mine employment with Mountaintop.[13]

The Employer noted on a letter from the OWCP that the Claimant's start date was January 2, 1997, and his end date was February 2, 1998. (DX 5.) However, the Claimant's payroll records from the Employer show that he was paid from January 9, 1997, through February 27, 1998. (DX 6.) The Claimant testified at his deposition that January 2, 1997, and February 20, 1998, sounded like the correct start and end dates of his employment with the Employer. (EX 7 at 22.)

[9] The average daily earnings in 1970 equaled $38.22. Dividing the Claimant's earnings of $592.63 by $38.22 yields 15.5 days of work per year and dividing that number by 125 working days yields 0.124 years.

[10] The average daily earnings in 1987 equaled $126.00. Dividing the Claimant's earnings of $1,510.50 by $126.00 yields 12 days of work per year and dividing that number by 125 working days yields 0.096 years.

[11] The average daily earnings in 1987 equaled $126.00. Dividing the Claimant's earnings of $5,581.66 by $126.00 yields 44.3 days of work per year and dividing that number by 125 working days yields 0.354 years. The average daily earnings in 1988 equaled $127.52. Dividing the Claimant's earnings of $12,690.10 by $127.52 yields 99.5 days of work per year and dividing that number by 125 working days yields 0.796 years. In 1989 the average daily earnings equaled $130.00. The Claimant is credited with one full year of coal mine employment for 1989, as dividing the Claimant's earnings for the year by $130.00 yields more than 125. Finally, in 1990, the average daily earnings equaled $133.68. Dividing the Claimant's earnings of $300.00 by $133.68 yields 2.24 days of work per year and dividing that number by 125 working days yields 0.018 years.

[12] The average daily earnings in 1994 equaled $142.08. Dividing the Claimant's earnings of $8,290.67 by $142.08 yields 58.4 days of work per year and dividing that number by 125 working days yields 0.467 years. In 1995, the average daily earnings equaled $147.52. Dividing the Claimant's earnings of $986.00 by $147.52 yields 6.7 days of work per year and dividing that number by 125 working days yields 0.054 years.

[13] The average daily earnings in 1996 equaled $149.92. Dividing the Claimant's earnings of $14,264.50 by $149.92 yields 95.1 days of work per year and dividing that number by 125 working days yields 0.76 years.

He also testified that he was paid on a weekly basis. (EX 7 at 16.) Based on the evidence available, it appears that January 2, 1997, through February 20, 1998, are the correct employment dates for which the Claimant would have received paychecks beginning on January 9, 1997, and ending on February 27, 1998. Thus, the Claimant's records show that he qualifies for the 20 C.F.R. § 725.101(a)(32)(ii) presumption that he worked at least 125 days during 1997. As there is no evidence to the contrary, the Claimant is credited with one year of coal mine employment for that year. For the partial year the Claimant worked in 1998, he made $2,745.02. (DX 6, 7.) Using the BLBA table, the Claimant is credited with an additional 0.051 years of coal mine employment,[14] bringing him to 1.051 years of coal mine employment with the Employer.

Accordingly, this Administrative Law Judge finds that the Claimant has a total of 4.72 years of coal mine employment.

IV. RESPONSIBLE OPERATOR

Pursuant to the Regulations, the district director must give notice of the claim to each potentially liable operator and its insurance carrier, if the claim falls within the insurance policy. 20 C.F.R. § 725.407(b) (2004). After receiving notice, the operator must respond within thirty days and indicate whether it accepts or contests its identification as a potentially liable operator. 20 C.F.R. § 725.408(a)(1). If the operator contests its identification, it must fill out a form provided by the district director indicating why it disagrees. 20 C.F.R. § 725.408(a)(2). The operator must admit or deny the following:

> (i) That the named operator was an operator for any period after June 30, 1973;
> (ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;
> (iii) That the miner was exposed to coal mine dust while working for the operator;
> (iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and
> (v) That the operator is capable of assuming liability for the payment of benefits.

Id. However, if the operator fails to respond within thirty days, it "shall not be allowed to contest its liability for the payment of benefits on any of the grounds set forth in paragraph (a)(2)." 20 C.F.R. § 725.408(a)(3).

The Employer argues in its post-hearing brief that it is not the responsible operator because it was not an operator as defined in the Regulations. The Director identified the Employer as a potentially liable operator and issued a Notice of Claim to it on March 11, 2003. (DX 18.) No potentially liable carrier was identified at this time. (DX 18.) The Employer failed to respond to this Notice. The Director issued a second Notice of Claim to the Employer on August 20, 2003, identifying American as the potentially liable carrier. (DX 23.) On September 19, 2003, American filed the operator's controversion on behalf of the Employer, admitting that the Employer was an operator after June 30, 1973, that it employed the miner as a miner for a cumulative period of not less than one year, that the miner's last employment with the Employer

[14] In 1998, the average daily earnings equaled $153.28. Dividing the Claimant's earnings of $986.00 by $153.28 yields 6.4 days of work per year and dividing that number by 125 working days yields 0.051 years.

included at least one working day after December 31, 1969, and that it was capable of assuming liability for payment of benefits. (DX 24.) The only point American controverted was that the Claimant was exposed to coal mine dust while working for the Employer. (DX 24.)

There is no evidence showing that the Employer received the first Notice of Claim, but the address on that notice is the same as the second Notice of Claim and the Schedule for Submission of Additional Evidence, which the Employer did receive. Therefore, it is presumed that the Employer received the first Notice. Even though the Employer received the second Notice and presumably the first, it failed to respond to either in a timely fashion. Additionally, American was not the Employer's carrier at the time the Claimant worked for the Employer. For that reason, American did not have the authority to represent or bind the Employer in this case and American's response to the second Notice cannot be taken as the Employer's response. Thus, as the Employer failed to timely respond to either Notice of Claim, it may not contest its liability on the grounds listed above, which precludes its argument that it is not an operator.

Furthermore, the designated responsible operator must, within thirty days of the district director's issuance of the schedule for the submission of additional evidence pursuant to 20 C.F.R. § 725.410, file a response regarding its liability. 20 C.F.R. § 725.412(a)(1). If it fails to do so, "it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim." 20 C.F.R. § 725.412(a)(2).

The District Director designated the Employer the responsible operator in the Schedule issued on July 16, 2003. (DX 20.) The Employer then had thirty days from that date, or until August 15, 2003, to respond. There is no argument that the Employer received the Schedule, as Mr. B. Owen at the Employer's address signed the return receipt on July 21, 2003. (DX 20.) The Employer failed to file a response to the schedule within the thirty day time limitation provided in 20 C.F.R. § 725.412(a)(1). Therefore, it is deemed to have accepted the designation as responsible operator and to have waived its right to contest liability at this level. Accordingly, this Administrative Law Judge finds the Respondent Employer is the operator responsible for paying any benefits owed to the Claimant under the Act.

V. EXISTENCE OF PNEUMOCONIOSIS AND THE CAUSAL RELATIONSHIP BETWEEN PNEUMOCONIOSIS AND COAL MINE EMPLOYMENT

As previously noted, the Act and Regulations define pneumoconiosis as a "chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b) (2000); 20 C.F.R. § 718.201(a). The definition of pneumoconiosis encompasses both clinical pneumoconiosis, which is any disease "recognized by the medical community as pneumoconioses," including coal workers' pneumoconiosis, and legal pneumoconiosis, which is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.201(a)(1)-(2).

The Regulations state that a finding of pneumoconiosis may be based on chest x-rays, autopsy or biopsy results, the presumptions in 20 C.F.R. §§ 718.304–718.306 if applicable, or the reasoned

medical opinion of "a physician, exercising sound medical judgment." 20 C.F.R. § 718.202(a) (2004). In the Sixth Circuit, the jurisdiction in which this case arose, a claimant may establish the existence of pneumoconiosis by any of the above methods. *Cornett v. Benham Coal Co.*, 227 F.3d 569, 575 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*). In this case, there are no biopsy or autopsy results and the presumptions of 20 C.F.R. §§ 718.304-718.306 do not apply. Therefore, a finding of pneumoconiosis must be made on the basis of chest x-rays or medical opinions.

A. Chest X-Rays

In a case where there is conflicting x-ray evidence, "in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. § 718.202(a)(1). Interpretations by dually qualified physicians (B-reader and Board-certified radiologist) may be given greater weight than the interpretation of a B-reader. *Scheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 1-131 (1984); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 (1985). Additionally, the administrative law judge may not simply consider the quantity of evidence without considering the quality of the evidence and qualifications of the readers. *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

The Claimant has submitted one chest x-ray in support of his claim that he suffers from pneumoconiosis. This x-ray, which was taken on June 20, 2002, was read as positive by Dr. Simpao, who is neither a B-reader nor a Board-certified radiologist. (DX 10; CX 1.) However, in rebuttal to that x-ray, the Employer has submitted the negative interpretation by Dr. Kendall, who is a B-reader[15] and is Board-certified in radiology. (EX 4; EX 6.) As a more qualified physician has interpreted the June 20, 2002, x-ray as negative for pneumoconiosis, this Administrative Law Judge finds that the Claimant has not established the existence of pneumoconiosis on the basis of this x-ray.

The Employer also submitted two x-ray interpretations as initial evidence, both of which were read as negative for pneumoconiosis. (EX 1, 3) Dr. Broudy and Dr. Rosenberg, the physicians who interpreted these x-rays, are both B-readers. (EX 2, 5.) Accordingly, because the most qualified physicians have interpreted the Claimant's x-rays as negative for pneumoconiosis, this Administrative Law Judge finds that the Claimant has failed to prove he suffers from pneumoconiosis on the basis of x-ray evidence.

B. Medical Opinions

A physician's finding of pneumoconiosis must be based on objective medical evidence and "shall be supported by a reasoned medical opinion." 20 C.F.R. § 718.202(a)(4). An opinion is reasoned when the administrative law judge finds the documentation to be adequate to support the physician's opinion. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion is documented when it sets forth the clinical findings, observations, data, and facts upon which the physician's opinion was based. *Id.* The administrative law judge has the discretion to determine whether a medical opinion is well-reasoned and an unreasoned or undocumented opinion may be given little to no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-

[15] Information obtained from the list of NIOSH B-readers.

155 (1989) (en banc). Additionally, the "administrative law judge may discredit a medical opinion based on an inaccurate length of coal mine employment," such as where the physician bases his opinion on eight years of coal mine employment, but the administrative law judge finds only four years. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 n. 8 (1993).

Here, the Claimant relies on the medical report of Dr. Simpao to establish the existence of pneumoconiosis. Dr. Simpao diagnosed the Claimant with coal workers' pneumoconiosis on the basis of his x-ray, pulmonary function study, physical examination, and symptomology. (DX 10.) He opined that the Claimant's history of coal dust exposure was "medically significant in his pulmonary impairment" and that he suffered from moderate occupational lung disease caused by his coal mine employment. (DX 10.) Little weight is accorded to Dr. Simpao's opinion because he failed to provide adequate reasoning to support his diagnosis of coal workers' pneumoconiosis. He does not explain how the Claimant's symptoms, clinical findings, x-ray, pulmonary function tests, and arterial blood gas studies led him to the conclusion that the Claimant was suffering from coal workers' pneumoconiosis as opposed to a smoking-related condition. In fact, it appears as though Dr. Simpao made his diagnosis of pneumoconiosis solely on the basis of the chest x-ray he read as positive. As the Benefits Review Board held in *Worhach*, "a medical opinion which is merely a restatement of an x-ray opinion may not establish the existence of pneumoconiosis." 17 B.L.R. at 1-110. Dr. Simpao's opinion is also undermined by the fact that the chest x-ray he based his opinion on was later read as negative by a more qualified physician. Additionally, he based his opinion on an erroneous coal mine employment history. Dr. Simpao noted that the Claimant had four years of underground mine employment and eight years of employment at the mine surface. However, as determined above, the Claimant only had 4.72 years of total coal mine employment.

Although Dr. Rosenberg and Dr. Broudy were also given inaccurate coal mine employment histories,[16] more weight is accorded to their opinions as they are more well-reasoned than Dr. Simpao's and are supported by their findings on examination and testing. Dr. Rosenberg opined that the Claimant does not suffer from clinical or legal pneumoconiosis or any impairment related to coal dust exposure. (EX 1; EX 2 at 25-26, 28.) He based his opinion on the Claimant's physical examination, chest x-ray, CT scan, the pulmonary function tests, and arterial blood gas studies. (EX 1; EX 2 at 19-20.) He also considered the smoking, medical, work, and social histories the Claimant gave him. (EX 2 at 19.) Dr. Rosenberg opined that the Claimant's airflow obstruction was not related to his coal dust exposure, but rather was related to his long and continuous smoking history, which was still quite heavy at the time, based on his elevated carboxyhemoglobin level of 7.5%. (EX 1; EX 2 at 15, 21.) While Dr. Rosenberg acknowledged that pneumoconiosis can cause obstruction, he explained that when coal mine dust causes obstruction, he does not expect to see significant bronchodilator response or airtrapping, but the Claimant exhibited both. (EX 1; EX 2 at 15.) He also explained that the Claimant's findings on examination were more consistent with bronchitis than coal dust exposure and the x-ray showed no findings related to dust. (EX 2 at 21.) He further stated that the CT scan confirmed that there was no evidence of clinical pneumoconiosis. (EX 1; EX 2 at 22.)

[16] The Claimant told Dr. Rosenberg that he had been around mines for approximately twenty-five years (EX 1; EX 2 at 20), while he told Dr. Broudy he worked in strip mining for about five or six years and in underground mines for about four years. (EX 3.)

Dr. Broudy also opined that the Claimant did not suffer from coal workers' pneumoconiosis or any other "chronic lung disease caused by the inhalation of coal mine dust or silica dust." (EX 3.) Like Dr. Rosenberg, he also attributed the Claimant's airflow obstruction to his history of cigarette smoking, rather than exposure to coal dust and he noted that the Claimant's elevated carboxyhemoglobin level of 6.0% indicated continued smoke exposure. (EX 3.) His opinions were based on the Claimant's physical examination, chest x-ray, pulmonary function tests, arterial blood gas studies, and the Claimant's smoking, medical, work, and social histories. (EX 3.)

Accordingly, based on the medical opinions proffered, this Administrative Law Judge finds that the Claimant has failed to prove that he suffers from pneumoconiosis, clinical or legal, caused by his coal mine employment.

VII. TOTAL DISABILITY AND CAUSATION OF TOTAL DISABILITY

Even if the Claimant was found to be suffering from clinical or legal pneumoconiosis, his claim would still fail because he has not established that he is totally disabled by a pulmonary or respiratory impairment. A miner is considered totally disabled if he has a pulmonary or respiratory impairment caused by coal mine employment and the impairment prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f); 20 C.F.R. § 718.204(b), (c). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. § 718.204(b), (d). Lay testimony may only be used in limited situations, none of which are present here. *See* 20 C.F.R. § 718.204(d)(1)-(5).

In this case, there is no evidence of cor pulmonale. Additionally, none of the Claimant's pulmonary function studies or blood gas studies yielded qualifying results, as noted in the table, *supra*.[17] Therefore, only a reasoned medical opinion could support a finding of total disability. The Claimant relies on Dr. Simpao's opinion that he is totally disabled from coal mine employment. As noted above, Dr. Simpao failed to provide adequate reasoning to support his opinion that the Claimant is totally disabled from his pulmonary impairment.

Both Dr. Rosenberg and Dr. Broudy opined that the Claimant retained the respiratory capacity to perform his previous coal mine work or similar manual labor, even though he has obstructive airway disease. (EX 1; EX 2 at 26; EX 3.) Dr. Broudy stated that the Claimant's pulmonary function tests were above the minimum disability standards as support for his conclusion. (EX 3.) Moreover, Dr. Rosenberg opined that his opinion would not change even if the Claimant did have x-ray evidence of simple pneumoconiosis, because the Claimant's functional abilities were well above disability standards during testing. (EX 2 at 27-28.)

Accordingly, even if the Claimant was suffering from clinical or legal pneumoconiosis, this Administrative Law Judge finds that the Claimant did not establish that he is totally disabled due to pneumoconiosis.

[17] In fact, Dr. Broudy even noted that the Claimant gave variable and weak effort during his pulmonary function test, yet the results still did not qualify the Claimant for total disability. (EX 3.)

ATTORNEY FEES

An award of attorney's fees under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. 33 U.S.C. § 928 as incorporated by 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

CONCLUSIONS AND FINDINGS OF FACT

After deliberation on all the evidence of record, including post-hearing briefs of counsel, this Administrative Law judge finds:

1. The Claimant's claim for benefits was timely filed.

2. The Claimant was a miner as defined by the Act and Regulations.

3. The Claimant is credited with 4.72 years of coal mine employment.

4. The Employer is the operator responsible for payment of any benefits owed to the Claimant under the Act.

5. The Claimant does not suffer from clinical or legal pneumoconiosis as defined by the Act and Regulations which was caused by his coal mine employment.

6. The Claimant is not totally disabled due to clinical or legal pneumoconiosis.

ORDER

It is **ORDERED** that the Claimant claim for benefits under the Act filed on April 18, 2002, is hereby **DENIED**.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/MSW/jcb

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with this Administrative Law Judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which this Administrative Law Judge's decision is filed with the District Director's office. *See* 20 C.F.R.

§§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, this Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

Attachment 1:

COAL MINE (BLBA) PROCEDURE MANUAL

AVERAGE EARNINGS OF EMPLOYEES IN COAL MINING		
Year	**Yearly (125 days) $**	**Daily $**
2004	21,570.00	172.56
2003	19,900.00	159.20
2002	19,640.00	157.12
2001	19,040.00	152.32
2000	19,090.00	152.72
1999	19,340.00	154.72
1998	19,160.00	153.28
1997	19,010.00	152.08
1996	18,740.00	149.92
1995	18,440.00	147.52
1994	17,760.00	142.08
1993	17,260.00	138.08
1992	17,200.00	137.60
1991	17,080.00	136.64
1990	16.710.00	133.68
1989	16,250.00	130.00
1988	15,940.00	127.52
1987	15,750.00	126.00
1986	15,390.00	123.12
1985	15,250.00	122.00
1984	14,800.00	118.40
1983	13,720.00	109.76
1982	12,698.75	101.59
1981	12,100.00	96.80
1980	10,927.50	87.42
1979	10,878.75	87.03
1978	10,038.75	80.31
1977	8,987.50	71.90
1976	8,008.75	64.07

1975	7,405.00	59.24
1974	6,080.00	48.64
1973	5,898.75	47.19
1972	5,576.25	44.61
1971	5,008.75	40.07
1970	4,777.50	38.22
1969	4,261.25	34.09
1968	3,801.25	30.41
1967	3,662.50	29.30
1966	3,438.75	27.51
1965	3,222.50	25.78
1964	3,031.25	24.25
1963	2,835.00	22.68
1962	2,717.50	21.74
1961	2,645.00	21.16
(See BLBA PM 2-700.11a and 14a(3)		